



Commonwealth of Virginia

VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY

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**STATE WATER CONTROL BOARD
ENFORCEMENT ACTION - ORDER BY CONSENT
ISSUED TO
SHEARER'S FOODS SA, INC.
FOR**

**the Shearer's Foods SA, Inc. Facility located at 225 Commonwealth Avenue
Extension, Bristol, VA
VPDES General Permit**

**For Stormwater Discharges Associated with Industrial Activity
Storm Water Registration No. VAR050047
Incident Report No. 300029**

SECTION A: Purpose

This is a Consent Order issued under the authority of Va. Code § 62.1-44.15, between the State Water Control Board and Shearer's Foods SA, Inc., regarding the Shearer's Foods SA, Inc. Facility located at 225 Commonwealth Avenue Extension, Bristol, Virginia, for the purpose of resolving certain violations of the State Water Control Law and the applicable permit and regulation.

SECTION B: Definitions

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "305(b) report" means the report required by Section 305(b) of the Clean Water Act (33 United States Code § 1315(b)), and Va. Code § 62.1-44.19:5 for providing Congress and

the public an accurate and comprehensive assessment of the quality of State surface waters.

2. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia, as described in Va. Code §§ 10.1-1184 and 62.1-44.7.
3. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia, as described in Va. Code § 10.1-1183.
4. "Director" means the Director of the Department of Environmental Quality, as described in Va. Code § 10.1-1185.
5. "Discharge" means the discharge of a pollutant.
6. "Discharge of a pollutant" when used with reference to the requirements of the VPDES permit program means:
 - a. Any addition of any pollutant or combination of pollutants to surface waters from any point source; or
 - b. Any addition of any pollutant or combination of pollutants to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.
7. "Facility" or "Site" means the Shearer's Foods SA, Inc. facility, located at 271 St. Clairs Crossing, Bluefield, Virginia, from which discharges of stormwater associated with industrial activity occur.
8. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.
9. "Order" means this document, also known as a "Consent Order" or "Order by Consent," a type of Special Order under the State Water Control Law.
10. "Permit" means VPDES General Permit No. VAR05, which was issued under the State Water Control Law and the Regulation on July 1, 2019 and which expires on June 30, 2024. Coverage under Registration No. VAR050047 was reissued to Shearer's Foods SA, Inc. on December 5, 2019.
11. "Regulation" means The General Virginia Pollutant Discharge Elimination System (VPDES) Permit for Discharges of Storm Water Associated with Industrial Activity, 9 VAC 25-151-10, *et seq.*

12. "Shearer's Foods SA, Inc." or "Shearer's" means Shearer's Foods SA, Inc., a corporation authorized to do business in Virginia and its affiliates, partners, and subsidiaries. Shearer's Foods SA, Inc. is a "person" within the meaning of Va. Code § 62.1-44.3.
13. "State Water Control Law" means Chapter 3.1 (§ 62.1-44.2 *et seq.*) of Title 62.1 of the Va. Code.
14. "State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands. Va. Code § 62.1-44.3.
15. "SWRO" means the Southwest Regional Office of DEQ, located in Abingdon, Virginia.
16. "Va. Code" means the Code of Virginia (1950), as amended.
17. "VAC" means the Virginia Administrative Code.
18. "VPDES" means Virginia Pollutant Discharge Elimination System.

SECTION C: Findings of Fact and Conclusions of Law

1. Shearer's Foods SA, Inc. owns and operates the Shearer's facility located at 225 Commonwealth Avenue Extension, Bristol, Virginia, which discharges stormwater associated with industrial activity.
2. The Permit allows Shearer's to discharge stormwater associated with industrial activity from the Facility to Little Creek, in strict compliance with the terms and conditions of the Permit.
3. Little Creek is located in the Tennessee and Big Sandy River Basin, Holston River Subbasin, Section 4, Class IV. Little Creek is listed in DEQ's 305(b) report as impaired for the recreational use due to fecal coliform, with sources listed as rural residential areas, unrestricted cattle access, and wastes from pets. Little Creek is also listed as impaired for the fish consumption use due to PCB in fish tissue, with the source listed as inappropriate waste disposal. Little Creek is included in the *Fecal Coliform TMDL for Little Creek Watershed, Virginia*, which was approved by the EPA on June 5, 2002 and by the SWCB on June 17, 2004.
4. On June 28, 2021, at approximately 1:20 PM, Shearer's notified SWRO that the release of AFCO 3030, a sodium hydroxide (NaOH) solution, at the Facility had resulted in a fish kill event in Little Creek, adjacent to the Facility. Incident Report No. 300029 was assigned to this incident. The release was reportedly the result of a forklift accident at the Facility, which had occurred at approximately 5:30 AM on that same date. The forklift had punctured a 250 gallon intermediate bulk container, releasing approximately 125

gallons of the NaOH solution onto a paved parking area and access road. The NaOH solution flowed along a curb to permitted Outfall 001 and subsequently discharged through a valve, which had been inadvertently left open, into Little Creek.

5. Also on June 28, 2021, SWRO staff responded to the reported fish kill event and met with the Shearer's Plant Manager, Virginia Department of Emergency Management staff, and representatives of the environmental consultant obtained by Shearer's to conduct containment and cleanup of the spill. The environmental consultant had pumped residual NaOH from the Little Creek stream bottom and was awaiting arrival of a vacuum truck to collect impacted soils from the top of a gabion basket retaining wall adjacent to Little Creek. SWRO staff, accompanied by the Shearer's Plant Manager, completed a count of dead fish in Little Creek.
6. The upstream extent of the fish kill was observed to be at the location where Little Creek flows adjacent to the Facility (coordinates N 36.61339, W 82.19313) at Outfall 001. SWRO staff observed a large number of live minnows immediately upstream of this location. The downstream extent of the fish kill was observed to be adjacent to Food City, on Bob Morrison Boulevard (coordinates N 36.60104, W 82.19322). SWRO staff observed live minnows downstream of this location. Large numbers of dead fish were observed upstream of this location. The total length of the fish kill was 1,582 meters, or 0.98 mile.
7. SWRO staff identified and counted dead fish in Little Creek utilizing American Fisheries Society methods. An estimated total of 7,915 fish were killed. The fish kill estimate was submitted to the Virginia Department of Wildlife Resources on June 29, 2021 for determination of the fish replacement costs. Replacement costs for the fish was determined to be \$2,361.19. The cost of DEQ staff investigation associated with this discharge of a caustic substance to Little Creek totaled \$1,636.66. These costs are to be recovered by separate demand letter from DEQ to Shearer's.
8. On July 16, 2021, DEQ issued NOV No. W2021-07-S-0001 to Shearer's for the unpermitted discharge of a caustic substance which resulted in the Little Creek fish kill event.
9. On July 19, 2021, Shearer's provided an initial telephone response to the July 16, 2021 NOV. A follow up written response was submitted on July 27, 2021. The written response provided a summary of the incident and remediation activities and included a chronology report, dated July 14, 2021, from the environmental contractor hired to conduct containment and cleanup activities. The response stated that the Facility's investigation of the incident had identified the open outfall valve and a forklift operator without formal training as the two primary contributing factors to the incident. The response indicated that Shearer's has implemented the following corrective actions as a result of the incident:
 - a) the outfall valve has been locked closed and formal assignment for operation of the valve has been designated;

- b) the outfall valve has been added to a monthly site inspection process, which has been assigned to a formal owner at the Facility that will be responsible for operation of the valve, logging each rainfall event requiring opening of the valve, logging closure and locking of the valve, and recording the condition of stormwater as being acceptable for discharge through the outfall valve;
 - c) the forklift "learner's license" process has been eliminated in order to ensure equipment is only operated by fully trained personnel; and
 - d) the Facility will explore alternative chemical handling procedures in order to determine the feasibility of eliminating outdoor chemical tote transport.
10. The Permit, at Part II, Section F, states: "Except in compliance with this permit, or another permit issued by the Board, it shall be unlawful for any person to: 1. Discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances; or 2. Otherwise alter the physical, chemical or biological properties of such state waters and make them detrimental to the public health, or to animal or aquatic life, or to the use of such waters for domestic or industrial consumption, or for recreation, or for other uses."
11. Va. Code § 62.1-44.5 states, in part: "Except in compliance with a certificate or permit issued by the Board..., it shall be unlawful for any person to... [d]ischarge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances...."
12. The Regulation, at 9 VAC 25-31-50, also states that except in compliance with a VPDES permit, or another permit issued by the Board, it is unlawful to discharge into state waters sewage, industrial wastes or other wastes.
13. The Regulation, at 9 VAC 25-260-20 of the Water Quality Standards requires that all state waters shall be free from substances attributable to sewage, industrial waste, or other waste in concentrations which interfere with designated uses of such water or which are harmful to human, animal, plant or aquatic life.
14. Va. Code § 62.1-44.15(5a) states that a VPDES permit is a "certificate" under the statute.
15. The Department has issued coverage under no permits or certificates to Shearer's for discharge of storm water associated with industrial activity, other than under VPDES Permit No. VAR05.
16. Little Creek is a surface water located partially within the Commonwealth and is a "state water" under State Water Control Law.
17. Based on the results of the June 28, 2021 DEQ field investigation and the July 27, 2021 written response from Shearer's, the Board concludes that Shearer's has violated Va. Code § 62.1-44.5, Regulation 9 VAC 25-31-50, Regulation 9 VAC 25-260-20, and the Permit, as described in paragraphs C(4) through C(9), above.

SECTION D: Agreement and Order

Accordingly, by virtue of the authority granted it in Va. Code §§ 62.1-44.15, the Board orders Shearer's Foods SA, Inc., and Shearer's Foods SA, Inc. agrees to pay a civil charge of \$19,500.00 within 30 days of the effective date of the Order in settlement of the violations cited in this Order.

Payment shall be made by check, certified check, money order or cashier's check payable to the "Treasurer of Virginia," and delivered to:

Receipts Control
Department of Environmental Quality
Post Office Box 1104
Richmond, Virginia 23218

Shearer's Foods SA, Inc. shall include its Federal Employer Identification Number (FEIN) with the civil charge payment **and** shall indicate that the payment is being made in accordance with the requirements of this Order for deposit into the Virginia Environmental Emergency Response Fund (VEERF). If the Department has to refer collection of moneys due under this Order to the Department of Law, Shearer's Foods SA, Inc. shall be liable for attorneys' fees of 30% of the amount outstanding.

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend this Order with the consent of Shearer's for good cause shown by Shearer's, or on its own motion pursuant to the Administrative Process Act, Va. Code § 2.2-4000 *et seq.*, after notice and opportunity to be heard.
2. This Order addresses and resolves only those violations specifically identified in Section C of this Order and in NOV No. W2021-07-S-0001, dated July 16, 2021. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the facility; or (3) taking subsequent action to enforce the Order.
3. For purposes of this Order and subsequent actions with respect to this Order only, Shearer's admits the jurisdictional allegations, findings of fact, and conclusions of law contained herein.
4. Shearer's consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.
5. Shearer's declares it has received fair and due process under the Administrative Process Act and the State Water Control Law and it waives the right to any hearing or other

administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to modify, rewrite, amend, or enforce this Order.

6. Failure by Shearer's to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.
7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.
8. Shearer's shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other unforeseeable circumstances beyond its control and not due to a lack of good faith or diligence on its part. Shearer's shall demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Shearer's shall notify the DEQ Regional Director verbally within 24 hours and in writing within three business days when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:
 - a. the reasons for the delay or noncompliance;
 - b. the projected duration of any such delay or noncompliance;
 - c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and
 - d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Regional Director verbally within 24 hours and in writing within three business days, of learning of any condition above, which the parties intend to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

9. This Order is binding on the parties hereto and any successors in interest, designees and assigns, jointly and severally.
10. This Order shall become effective upon execution by both the Director or his designee and Shearer's. Nevertheless, Shearer's agrees to be bound by any compliance date which precedes the effective date of this Order.

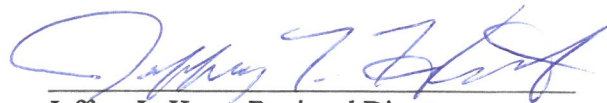
11. This Order shall continue in effect until:

- a. the Director or his designee terminates the Order after Shearer's has completed all of the requirements of the Order;
- b. Shearer's petitions the Director or his designee to terminate the Order after it has completed all of the requirements of the Order and the Director or his designee approves the termination of the Order; or
- c. the Director or Board terminates the Order in his or its sole discretion upon 30 days' written notice to Shearer's.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve Shearer's from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

12. Any plans, reports, schedules or specifications attached hereto or submitted by Shearer's and approved by the Department pursuant to this Order are incorporated into this Order. Any non-compliance with such approved documents shall be considered a violation of this Order.
13. The undersigned representative of Shearer's certifies that he or she is a responsible official authorized to enter into the terms and conditions of this Order and to execute and legally bind Shearer's to this document. Any documents to be submitted pursuant to this Order shall also be submitted by a responsible official of Shearer's.
14. This Order constitutes the entire agreement and understanding of the parties concerning settlement of the violations identified in Section C of this Order, and there are no representations, warranties, covenants, terms or conditions agreed upon between the parties other than those expressed in this Order.
15. By its signature below, Shearer's voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 19th day of October, 2021.



Jeffrey L. Hurst, Regional Director
Department of Environmental Quality

Shearer's Foods SA, Inc. voluntarily agrees to the issuance of this Order.

Date: 8/20/21 By: Fritz Kohmann, CFO
(Person) (Title)
Shearer's Foods SA, Inc.

State of Ohio
~~Commonwealth of Virginia~~

~~City/County of~~ Stark

The foregoing document was signed and acknowledged before me this 20 day of
August, 2021, by Fritz Kohmann who is
CFO of Shearer's Foods SA, Inc., on behalf of the corporation.



Jessica Mayle
Notary Public, State of Ohio
My Commission Expires:
05/10/2026

Jessica Mayle
Notary Public

Registration No. _____

My commission expires: _____

Notary seal: